IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. .....

C. K. BENSON and W. HAVARD PERKINS, Doing Business as PERKINS AND COMPANY, a Partnership,

Petitioners,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

Respondent.

BRIEF

In Support of Petition for Writ of Certiorari.

OPINION OF THE COURT BELOW.

In L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner, v. C. K. Benson and W. Havard Perkins, Doing Business as Perkins and Company, a Partnership, Respondents (No. 1994), in the District Court, the petitioners here (respondents there) prevailed on their motion to dismiss for lack of jurisdiction (R. 9-10).

The Circuit Court of Appeals for the Eighth Circuit reversed the order of dismissal, and remanded the case with directions to grant the administrator leave to amend his application if he can and wishes to do so. The opinion

is reported as L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, appellant, v. C. K. Benson and W. Havard Perkins, Doing Business as Perkins and Company, a Partnership, appellees (No. 12,534), 137 F. (2d) 501 (R. 14-24).

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, 26 Stat. 828, as amended, 28 U. S. C. A., Section 347 (a).

2. The date of the judgment of the Circuit Court of Appeals for the Eighth Circuit herein sought to be reviewed is August 13, 1943, and petition for rehearing was denied September 9, 1943.

3. The cases believed by your petitioner to sustain your jurisdiction and relied on for the exercise thereof, are referred to in the preceding petition (pages 7-10), to which reference is made for the sake of brevity.

STATEMENT OF THE CASE.

For the sake of brevity, we refer to the preceding petition, pages 1 to 5.

ASSIGNMENTS OF ERRORS.

1. The Circuit Court of Appeals for the Eighth Circuit erred in holding that in a proceeding pursuant to Section 9 of the Fair Labor Standards Act to compel compliance to a subpoena duces tecum, the employer is not entitled to a trial and adjudication of the question of coverage under the act.

2. The Circuit Court of Appeals for the Eighth Circuit erred in holding that, "in the collaboration of judicial power and function with administrative process • • • courts must conscientiously guard against any instinct of over-protectiveness," of the constitutional rights of citizens, where such "over-protectiveness" will interfere with "proper administrative effort and result," and holding further in this connection that it would not be an unreasonable search and seizure for the Administrator, merely upon reasonable ground to believe that an employer was apparently subject to the act, to compel the production of the books, records and papers of such employer in order to enable the Administrator to determine whether such employer was subject to the act, even though the employer be not actually subject to the act, and had been denied a hearing on the question of coverage.

3. This case presents questions of prime importance as to the authority of the Administrator under the Fair Labor Standards Act. A decision of this Court on the issues involved is believed to be of extreme importance, not only for the future guidance of the Administrator in the performance of his duties under the act, but also to the Petitioners and the employing public in general.

The United States Circuit Court of Appeals for the Sixth Circuit held in the case of General Tobacco and Grocery Company v. Fleming, 125 Fed. (2d) 596, that:

> "It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects."

The Court of Appeals for this Eighth Circuit in the case at bar held that,

> "Thus, while it is our view that the employer is not entitled to a trial and adjudication of the question of coverage on the Administrator's application to enforce an investigatory subpoena, and that the Administrator is not required to make proof of actual coverage as a basis for judicial aid in its enforcement, we believe that the district court is entitled to the assurance that it is not giving judicial sanction and force to unwarranted or arbitrary action, but that reasonable ground exists for making the investigation" (R. pp. 17-18).

And further,

> "For investigatory purposes under the Act, it would amount simply to a justifiable basis for believing that a certain state of facts probably exists, derived from reasonable inquiry or other credible information. As applied to the immediate situation, it would be such facts or information as reasonably would lead the Administrator to believe that appellees' business, in some phase, was apparently and probably subject to the Act" (R. p. 21).

There is a clear conflict between the holding of the Circuit Court of Appeals for the Sixth Circuit, in the General Tobacco and Grocery Company case, supra, and the holding of the Court of Appeals in the case at bar, which is admitted by the Eighth Circuit in its opinion (Footnote 2, R. p. 17).

We feel that the public interests require that this conflict should be reviewed and settled by this Court in this case in order to secure uniformity of decisions.

Aside from the importance of settling the issue of the authority of the Administrator in the respects mentioned under the Fair Labor Standards Act, and the conflict between the decision of the Eighth Circuit in this case and the decision of the Sixth Circuit in the case of General Tobacco and Grocery Company, supra, we believe that the decision of the Court of Appeals in the case at bar is susceptible of the interpretation that the Court has enunciated in its opinion the dangerous, untenable doctrine that the courts should not be overzealous in safeguarding the constitutional right of citizens if to do so will interfere with the effective enforcement of a federal law. Such a holding is clearly erroneous and not in accord with the principles enunciated by this Court in certain applicable decisions, as pointed out in our supporting brief.

4. The Circuit Court of Appeals for the Eighth Circuit erred in interpreting the holding of this Court in Endicott Johnson Corp. v. Perkins, 317 U. S. 501, as "clearly pointing the way" to the conclusion that an employer is not entitled to a trial and adjudication of the question of coverage under the Fair Labor Standards Act.

5. The Circuit Court of Appeals for the Eighth Circuit erred in reversing and remanding the cause with direction that "the Administrator should be given leave to amend his application if he can and wishes to do so, to allege that he has reasonable ground to believe that" petitioners' business is subject to the Fair Labor Standards Act, where there was no error on the part of the District Court on the pleadings presented to the District Court, and where the Administrator did not at any time seek or ask leave of the District Court, or the Court of Appeals, to amend his application.

ARGUMENT.

The Circuit Court of Appeals for the Eighth Circuit Erred in Holding That in a Proceeding Pursuant to Section 9 of the Fair Labor Standards Act to Compel Compliance to a Subpoena Duces Tecum the Employer Was Not Entitled to a Trial and Adjudication of the Question of Coverage Under the Act.

The Administrator did not in his application to compel compliance to the subpoena duces tecum make any allegations of any kind that the Petitioners or any of their employes were engaged in commerce or in the production of goods for commerce, or were in any way subject to the Fair Labor Standards Act.

Any power the Administrator has to investigate the petitioners must be found in the provisions of the Fair Labor Standards Act. The only section of the act authorizing investigations by the Administrator is Section 11 (June 25, 1938, c. 676, Sec. 11, 52 Stat. 1066, 29 U. S. C. A., Sec. 211), which reads in part:

> "(a) The administrator or his designated representatives may investigate and gather data regarding the wages, hours and other conditions and practices of employment in any industry **subject to sections 201-219 of this title**, and may enter and inspect **such** places and **such** records * * *, question such employees, and investigate **such** facts, conditions and practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of sections 201-219 of this title * * *." (Emphasis supplied.)

The Administrator in his application to compel compliance to his subpoena duces tecum contends (R. ..) that this section 11 (a) empowers him to investigate the petitioners. It is, therefore, important to note the conditions

under which section 11 (a) authorizes investigations by the Administrator. This section in clear and explicit language limits the investigatory power of the Administrator to those subject to the act. In enacting the Fair Labor Standards Act Congress did not exercise its full power under the Commerce Clause of the Constitution, to include any industry or employer engaged in activities **affecting** interstate commerce. Instead, Congress expressly (Sections 2, 6, 7 and 8) restricted the scope of the coverage and applicability of the Fair Labor Standards Act to those who are "engaged in commerce or in the production of goods for commerce." Thus, before an employer is subject to the act and subject to investigation by the Administrator he must be engaged in interstate commerce or in the production of goods for commerce.

This limited scope of the act has been noted and commented on by this Court and by various Circuit Courts of Appeal. In Kirschbaum v. Walling, 316 U. S. 517, Mr. Justice Frankfurter in discussing the coverage of the act, said:

> "The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employers 'engaged in commerce in any industry affecting commerce.' See H. Rep. No. 2182, 75th Cong., 3rd Sess., p. 2; 83 Cong. Rec. 7749-50. But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce.' H. Rep. No. 2738, 75th Cong., 3rd Sess., pp. 29-30; 83 Cong. Rec. 9158, 9266-67. Moreover, in one of its intermediate stages, the measure incorporated the Shreveport doctrine, Houston & Texas Ry. v. United States, supra, in that it was specifically made applicable to interstate production which competed with goods produced in another state. S. 2475, 75th Cong., 3rd Sess., as recommitted December 17, 1937, Sec. 8 (a). But, as reported by the House Com-

mittee on Labor, this provision was deleted. S. 2475, supra, as reported April 21, 1938; see H. Rep. 2182, supra."

Mr. Justice Frankfurter goes on to point out that, by reason of the restricted coverage and applicability of the Fair Labor Standards Act, the judicial interpretation given to other congressional acts relating to interstate commerce furnish no applicable rules of guidance in the interpretation of the Fair Labor Standards Act; in this respect declaring:

> "In this task of construction, we are without the aid afforded by a preliminary administrative process for determining whether the particular situation is within the regulated area. Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair (Labor) Standards Act **puts upon the courts the independent responsibility of applying** ad hoc the general terms of the statute to an infinite variety of complicated industrial situations." (Emphasis supplied.)

For other cases noting the limited sphere of application of the Fair Labor Standards Act see:

Jewel Tea Company v. Williams et al. (C. C. A. 10th), 118 F. (2d) 202;
Jax Beer Company v. R. J. Redfern etc. (C. C. A. 5th), 124 F. (2d) 172;
General Tobacco & Grocery Co. v. Fleming (C. C. A. 6th), 125 F. (2d) 596;
Walling v. Goldblatt Bros., Inc. (C. C. A. 7th), 128 F. (2d) 778.

It is clear from the express language of the act and from its legislative history that the Fair Labor Standards Act has relation and application only to those engaged in interstate commerce or in the production of goods for interstate commerce, and that none of the provisions of the

act can be applied or extended to those not engaged in interstate commerce or in the production of goods for interstate commerce.

The Administrator, therefore, has no power under section 11 (a) of the act to investigate an employer who is not engaged in commerce or in the production of goods for commerce.

The question then arises, and it is a fundamental question in the instant case, as to the point at which an employer who is not subject to the act, i. e., not engaged in commerce or in the production of goods for commerce, may resist the efforts of the Administrator to investigate his business. Obviously, such an employer can do nothing until the Administrator takes some action to bring about the attendance of witnesses or the production of books, papers and documents. The Administrator is given power to require the attendance of witnesses and the production of documents by Sec. 9 of the Act (June 25, 1938, c. 676, Sec. 9, 52 Stat. 1065, 29 U. S. C. A., Sec. 209), which provides:

> "For the purpose of any hearing or **investigation provided for in Sections 201-219 of this title** the provisions of sections 49 and 50 of title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are hereby made applicable to the jurisdiction, powers, and duties of the administrator * * *." (Emphasis supplied.)

Section 9 specifically provides that unless the investigation is one authorized by the act, the Administrator has no power to require the attendance of witnesses or the production of books, and the act does not authorize the investigation of those who are not engaged in commerce or in the production of goods for commerce. Section 9 of the act incorporates and makes applicable Sections 9 and 10 of the Federal Trade Commission Act (Sept. 26,

1914, c. 311, Secs. 9, 10, 38 Stat. 722, 723, 15 U. S. C. A., Secs. 49, 50). Section 9 of the Federal Trade Commission Act empowers the commission (Administrator) to require by subpoena the attendance of witnesses and the production of documents, and further provides:

> "* * * and in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
>
> "Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena * * * issue an order requiring such corporation or other person * * * to produce documentary evidence * * *."

If an employer is not subject to the act, and the Administrator nevertheless issues a subpoena duces tecum to the employer, the employer can either comply with the subpoena, even though the Administrator has no power to investigate him, or he can refuse to comply. If he follows the latter method, the Administrator may then seek the aid of a district court to compel compliance. The only opportunity the employer has to question the propriety of the Administrator's action is at the proceeding to compel compliance. Section 9 of the Federal Trade Commission Act by the use of the word "may" specifically gives the Court discretion to grant or refuse the application of an administrator to compel compliance, and at such a proceeding the employer has full opportunity to contest the validity of the subpoena including the question of coverage under the act.

Inasmuch as Congress, in enacting the Fair Labor Standards Act, adopted the subpoena powers established in Sections 9 and 10 of the Federal Trade Commission Act (15 U. S. C. A., Sections 49 and 50), it is important to

notice how these sections have been construed in cases arising under the Federal Trade Commission Act. These cases clearly show that a hearing must be held on the question of coverage. In Federal Trade Commission v. Smith, 34 F. (2d) 323, the Commission sought papers relating to the intrastate business of the respondent. The Court said:

> "**Until the powers of petitioner with respect to such inquiries as it may undertake shall have been enlarged by appropriate statutes, the present limitations which hedge about its inquisitorial functions must be recognized.** One of them is that until particular documents, including books, become evidentiary, respondent corporation is not obligated to lay before the commission its books and papers for scrutiny in 'an investigation to ascertain whether the anti-trust laws have been violated, and to report facts to Congress on a subject over which it has legislative jurisdiction and concerning which it has directed the Commission to report." (Emphasis supplied.)

Here the Court assumed at the outset that the respondent was engaged in interstate commerce and said:

> "If respondents wish to contest the propriety of this assumption, **the matter will have to go to a master,** or, if petitioner wishes an adjudication to the effect that the intrastate business of the Electric Bond & Share Company is so intimately associated and connected with interstate commerce that all the company's activities are subject to the jurisdiction of the commission, a reference will be required to establish the fact." (Emphasis supplied.)

In Federal Trade Commission v. Claire Furnace Co. et al., 274 U. S. 160, 71 L. Ed. 798, 160 S. Ct. 175, the respondents sought to enjoin the enforcing or attempting to enforce orders issued by the Federal Trade Commission requiring the respondents to furnish designated papers.

It was there held by this Court that the only methods prescribed for enforcing the subpoena duces tecum were those specified in Sections 9 and 10 of the Federal Trade Commission Act, and said:

> "Until the Attorney-General acts, the defendants cannot suffer, and when he does act, **they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them.** That right being adequate, they were not in a position to ask relief by injunction." (Emphasis supplied.)

Now it is important to notice that these cases, construing Sections 9 and 10 of the Federal Trade Commission Act, were decided before the enactment of the Fair Labor Standards Act. It must, therefore, be presumed that Congress knew of these judicial constructions of sections 9 and 10. In adopting these sections, after they had been judicially construed to the effect that a hearing must be had on the question of coverage at the time of the application to compel compliance to a subpoena duces tecum, Congress also adopted that judicial construction.

Cases arising under the Fair Labor Standards Act have likewise held that an employer must, in order to conform to constitutional requirements, be granted a hearing on the issue of coverage at the proceeding to compel compliance.

> General Tobacco & Grocery Co. v. Fleming (C. C. A. 6th), 125 F. (2d) 596;
> Application of Walling (News Printing Co.), 49 F. Supp. 659;
> New Orleans Private Patrol Service, Inc., v. Fleming, 33 F. Supp. 856.

Cases involving other administrative agencies have also held that a respondent has full opportunity to present all defenses at the proceeding to compel compliance.

> Securities & Exchange Commission v. Tung Corporation, 32 F. Supp. 371;

Meyers v. Bethlehem Shipbuilding Corporation, 303 U. S. 41, 49;

Federal Power Commission v. Edison Co., 304 U. S. 375, 386;

E. I. DuPont de Nemours Co. v. Boland (C. C. A. 2nd), 85 F. (2d) 12;

Goodyear Tire & Rubber Co. v. N. L. R. B. (C. C. A. 6th), 122 F. (2d) 450.

The law has been summarized in 2 Von Bour, Federal Administrative Law, Section 607, pp. 593-595:

> "The inquiry whether a witness before an administrative agency is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to an administrative agency for final determination. The issue presented is not one of fact, but of law exclusively * * *. Hence judicial review of the validity of a subpoena issued by an administrative agency may ordinarily be had upon application to a court by the agency for enforcement of the subpoena, that is, for a court order specifically directing that the witness appear and testify or produce designated documents. **Upon such an application to a court the parties affected have full opportunity to contest the subpoena's validity, and all defenses and all objections may be raised against the appearance of the witness or the production of documents.**" (Emphasis supplied.)

The Circuit Court of Appeals for the Eighth Circuit Erred in Holding That It Would Not Be an Unreasonable Search and Seizure for the Administrator, Upon Reasonable Ground to Believe That an Employer Apparently Was Subject to the Act, to Compel Production of the Documents of Such Employer to Determine Whether He Was Subject to the Act, Even Though the Employer Was Not Actually Subject to the Act and Had Been Denied a Hearing on the Question of Coverage.

The Administrator in his application did not, even on information and belief, allege, or set forth any facts indicating that petitioners or any of their employees were engaged in interstate commerce or in the production of goods for interstate commerce, nor did he allege that he had reasonable ground to believe the petitioners or any of their employees were so engaged, nor did he on the hearing on the motion to dismiss offer to make a showing of any nature. As revealed by his brief, it was the Administrator's contention that he was not "required to allege facts probative of coverage" because the petitioners might deny them "thereby posing a factual issue for the District Court for litigation" and that such a "determination of coverage would result in unnecessarily complicating and extending the procedure for the enforcement of the Act." The only issue presented on the pleadings to the District Court was: "Does the Administrator of the Wage and Hour Division have **an absolute right** to a compliance order from the District Court for the enforcement of an investigatory subpoena duces tecum **without regard to whether the business involved actually is under the Act?**" Inasmuch as a motion to dismiss is not a responsive pleading, the Administrator could have amended as of right at any time up to the time of the order of dismissal. Or, the Administrator could have asked the District Court for

leave to amend at the time of the dismissal of the application or at any time during the three months thereafter within which he had the right to take his appeal. The Administrator, however, did not choose to amend. He purposefully and designedly presented to both the District Court and the Circuit Court of Appeals the sole issue of whether he could, as of right, demand that the District Court compel compliance to a subpoena duces tecum where there were no allegations whatsoever that the employer was subject to the act. The District Court held that it would not enforce such an application and entered an order of dismissal. The Circuit Court of Appeals for the Eighth Circuit had exactly the same issue presented to it. While the Circuit Court of Appeals recognized that the District Court, in dismissing the application of the Administrator, acted properly on the existing pleadings, it nevertheless reversed and remanded with direction that the "Administrator should be given leave to amend his application, **if he can and wishes to do so**, to allege that he has reasonable ground to believe that appellees' business is subject to the Act," and that further proceedings in harmony with the opinion he had. In the opinion the Court held that "in order to be entitled to a compliance order from the District Court for the enforcement of an investigatory subpoena, the Administrator is only required to satisfy the Court of the existence of reasonable ground for making the investigation, i. e., reasonable ground to believe that the industry is subject to the act, and not to make proof of actual coverage under the act, nor is the employer entitled to a trial and adjudication of the question of coverage on such application." Although the Court does not specifically say so, this showing of reasonable ground presumably could be done ex parte and by affidavit. This is because the employer could not come in and say or prove there was no reasonable ground for the Administrator to believe the employer was subject to the

act, because as a matter of fact, he was not engaged in commerce or in the production of goods for commerce; this would constitute a hearing on the question of coverage which is prohibited by the opinion. There are unquestionably situations where the Administrator might reasonably believe that an employer's business is "apparently" subject to the act, when as a matter of fact the employer's business is not so subject. Thus it is seen, even presuming that the Administrator at all times acted in good faith, the opinion of the Circuit Court of Appeals would allow the investigation of the books, papers and records of an employer not subject to the act. Once the Administrator has compelled the examination of the records of an employer not subject to the act, that employee's right against unreasonable searches and seizures will have been violated.

Congress in enacting the Fair Labor Standards Act limited the sphere of operations of the Administrator to investigating those **subject to the act**; that is, those engaged in commerce or in the production of goods for commerce. Had Congress gone farther, which it did not do, and authorized the Administrator to investigate, through subpoena, any industry which he reasonably believed was apparently subject to the act, so that he could determine whether they were subject to the act, its action would have been unconstitutional. Federal Trade Commission v. American Tobacco Co., 264 U. S. 298. Yet, the Circuit Court of Appeals for the Eighth Circuit is, by judicial legislation, empowering the Administrator to conduct such investigations to determine whether an employer is subject to the act and is such an employer as the Administrator is authorized by section 11 (a) of the act to investigate. The opinion of the Circuit Court of Appeals runs contrary to our traditional judicial regard for the constitutionally guaranteed rights of the citizens, as the following excerpts clearly demonstrate:

Mr. Justice Bradley, in Boyd v. U. S., 116 U. S. 616, 635, 29 L. Ed. 746, 752, 6 S. Ct. 520, warned:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure * * *. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."

In In re Pacific Railway Commission, 12 Sawy. 559, 32 Fed. 241, 263, Judge Sawyer said:

> "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission **without any allegations**, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end."

In Jones v. Securities and Exchange Commission, 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654, this Court had before it an unlawful use of a subpoena duces tecum by the Securities and Exchange Commission. The Court declared:

> "* * * Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the peo-

ple, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."

Where, as here, an employer is not subject to the act and is denied the right to have a hearing on the question of coverage, a compulsory production of his documents would clearly violate his constitutional rights.

The Circuit Court of Appeals for the Eighth Circuit Erred in Refusing to Hold That This Case Was Controlled by the Rules of Decision Laid Down in General Tobacco & Grocery Co. v. Fleming (C. C. A. 6th), 125 F. (2d) 596.

The Sixth Circuit Court of Appeals in General Tobacco & Grocery Co. v. Fleming, 125 F. (2d) 596, ruled directly on the same issue presented in the instant case, and the applicable doctrines, enunciated by the Sixth Circuit in that case should control in the case at bar. In the General Tobacco & Grocery Co. case the Administrator alleged on information and belief that the employer was engaged in interstate commerce, while in the instant case there were no allegations of any kind, either on information and belief, or otherwise, probative of coverage. In the General Tobacco & Grocery Co. case, the employer, in response to the show-cause order, alleged that it was not engaged in interstate commerce or in the production of goods for interstate commerce, and that all of its employees were engaged wholly in intrastate activities. The District Court denied a hearing on the question of coverage. The Circuit Court of Appeals reversed and remanded the cause. The Court there makes a thorough analysis of the Fair Labor Standards Act and of the Administrator's contention that he has by the Act been accorded visitorial and

inquisitorial power over all industry, to determine whether any person has violated any provision of the Act. The Court concluded, l. c. 599:

> "To adopt this constrained construction would extend the sweep of his inquisitorial power beyond the apparent intention of Congress, as evidenced by the repeated limitations of the applicability of the Act to those subject to its provisions. An administrator must restrain himself within the bounds of his delegated authority. It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects.
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> "In the exercise of the judicial power to review questions of law, as conferred by an act of Congress, the seal of a United States Court should not become a mere rubber stamp for the approval of arbitrary action by an administrative agency. Why, in the context, should any power of review whatever have been vested in the courts, unless Congress intended that such review should be judicially exercised?"

The Court then discussed various cases relied on by the Administrator, and points out that in most of them the initial coverage was admitted, and that the question presented was not one of whether there was coverage but one of the **scope or extent** of the admitted coverage. The admission of coverage may be of particular employees or of particular units of the employer's operations. Where such an admission of coverage is made, the courts have properly held that the Administrator may subpoena records to determine the scope of the coverage. This distinction between the initial determination of coverage and the determination of the scope of admitted coverage is fundamental. In Fleming v. Montgomery Ward & Co. (C. C. A. 7th), 114

F. (2d) 384, the employer admitted it was subject to the Act, but contended the Administrator could not examine records of exempt employees. In Martin Typewriter Co. v. Walling (C. C. A. 1st), 135 F. (2d) 918, the employer admitted that some of its goods went into interstate commerce, but claimed exemption as a retail and servicing establishment. In Cudahy Packing Co. v. Fleming (C. C. A. 8th), 122 F. (2d) 1005, the employer admitted coverage of one plant and the Court said:

> "* * * Where an employer is engaged in operating more than one plant or establishment, and seeks to claim that a part of such plants is subject to the act and another is not, there can be no possible question as to the right of the Administrator to inspect the shipment records of all of them, **in order to determine the scope of the operations of each and the relationship between them.**" (Emphasis supplied.)

In Endicott-Johnson Co. v. Perkins, 317 U. S. 501, arising under the Walsh-Healey Act, the employer subjected itself to the coverage of the act by voluntarily entering into a contract with the Government.

The preceding cases all involved the determination of the scope of an admitted or established coverage, they are not applicable where there is a denial of any coverage whatsoever.

It is submitted that the rules laid down in the General Tobacco & Grocery Co. case, supra, are controlling here, that the petitioners are entitled to a hearing on the question of coverage, and that it would be a violation of the guaranty against unreasonable searches and seizures to compel them to produce their documents without such a hearing.

The Circuit Court of Appeals for the Eighth Circuit Erred in Interpreting the Holding of This Court in Endicott-Johnson Co. v. Perkins, 317 U. S. 501, as "Clearly Pointing the Way" to the Conclusion That an Employer Is Not "Entitled to a Trial and Adjudication of the Question of Coverage."

Judge Johnsen, writing the opinion for the Circuit Court of Appeals, states that an employer is not entitled to a trial and adjudication of the question of coverage in a proceeding to compel compliance to a subpoena duces tecum. In the footnotes (footnote 2) to this statement he states: "The question has not been specifically passed upon by the Supreme Court in relation to the Fair Labor Standards Act." He then goes on to discuss Endicott-Johnson Corp. v. Perkins, 317 U. S. 501, saying:

> "It was held that an industry which had voluntarily subjected itself to the authority of the Secretary of Labor under the Walsh-Healey Act * * * by seeking to obtain public contracts, was not entitled to a trial in the District Court of the question of coverage on an application to enforce a subpoena for the production of evidence * * *. The court had granted certiorari in that case because of a probable conflict between the decision of the Second Circuit Court of Appeals in the Endicott-Johnson Corp. case, 128 F. (2d) 208, and the decision of the Sixth Circuit Court of Appeals in the General Tobacco & Grocery Co. case * * *. The opinion, however, did not attempt to discuss the question of any conflict between the two decisions, presumably because different statutes were involved in the two cases. While the court thus did not expressly disapprove (nor, of course, approve) the General Tobacco & Grocery Co. decision, its expressions have been accepted in some of the cases cited above as clearly pointing the way on the question, and we think soundly so * * *."

Thus while the Court recognized that the Endicott-Johnson Corp. case involved a different factual and legal situation, and involved a different law, and that this Court did not disapprove the General Tobacco & Grocery Co. case, it, nevertheless, blurs and obliterates that recognition beyond distinction by stating that the Endicott-Johnson Corp. case can be soundly accepted as pointing the way to the conclusion that an employer is not entitled to a hearing on the question of coverage under the Fair Labor Standards Act. This interpretation of the Endicott-Johnson Corp. case is tantamount to saying that that case overruled the General Tobacco & Grocery Co. case, and the opinion and judgment of the Circuit Court of Appeals for the Eighth Circuit clearly shows that the Court proceeded under this erroneous interpretation.

As pointed out by Mr. Justice Jackson, in the Endicott-Johnson Corp. case:

> "The (Walsh-Healey) Act directs the Secretary to administer its provisions. It is not an act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract."

That situation does not exist at all in the present case. Had the Secretary of Labor sought to investigate the records of an employer who had no contracts whatsoever with the Government, and the employer opposed the enforcement proceedings on the ground that he was not subject to the Act, a question analogous to the instant case might have been presented. There, however, the employer had voluntarily sought and obtained government contracts knowing that in doing so he subjected himself to the coverage of the Walsh-Healy Act. The question there presented was not one of whether there was coverage, but was one of the scope of the investigatory powers of the

Secretary of Labor after coverage was already established by the acceptance of government contracts. As has been pointed out before, the cases under the Fair Labor Standards Act hold that once coverage is established the Administrator may investigate all of the employers' activities to determine the extent or scope of the established or admitted coverage, but that is not the issue presented in the case at bar. In the case at bar the issue is whether there is any coverage in any respect.

A District Court case, Application of Walling (News Printing Company), 49 F. Supp. 659, clearly points out the distinction between the situation in the Endicott-Johnson Corp. case and the situation found in the instant case.

It is worth noting that Congress, in providing for an enforcement order in the case of the refusal of an employer who had by contract subjected himself to Walsh-Healey Act, provided that the District Court "**shall** have jurisdiction to issue to such person an order requiring such person * * *" to produce evidence before the Secretary of Labor. (Title 41, Sec. 39, U. S. C. A.) The use of the word "shall" in the Walsh-Healey Act in contradistinction to the use of the word "may" in a comparable section of the Federal Trade Commission Act, which is incorporated into the Fair Labor Standards Act, indicates that Congress intended that a District Court in a proceeding under the Fair Labor Standards Act should exercise its independent discretion upon a hearing of the various issues presented to it.

Judge Johnsen cites the cases of Walling v. Standard Dredging Corp. (C. C. A. 2nd), 132 F. (2d) 322, and Martin Typewriter Co. v. Walling (C. C. A. 1st), 135 F. (2d) 918, as accepting the Endicott-Johnson Corp. decision as pointing the way to the conclusion that the employer may not have a hearing on the question of coverage.

In the Standard Dredging Corp. case, the employer contended that he was exempt because all but four of his

employees were seamen. The District Court held that that exemption clause applied only to a part of the Act, and not to the entire Act. The Court also held, 44 F. Supp. 601, that Section 11 (a) of the Act conferred two distinct investigatory powers on the Administrator, which distinction had been rejected by the Circuit Court of Appeals for the Sixth Circuit in the General Tobacco & Grocery Co. case, supra. The Court in the Standard Dredging Corp. case recognized that the General Tobacco & Grocery Co. case was contra, and that "no reported authority passing on the precise question here presented which supports the view taken herein has been called to my attention." The Second Circuit Court of Appeals affirmed the District Court per curiam, without opinion, on authority of Endicott-Johnson Corp. v. Perkins, 317 U. S. 501. The Standard Dredging Corp. case is of dubious value, and it may well be distinguished from the instant case in that the employer there admitted that he was subject to the Act but claimed exemption therefrom.

In Martin Typewriter Co. v. Walling, the District Court (48 F. Supp. 751) pointed out that the employer admitted that some of his goods went into interstate commerce, but claimed exemption as a retail establishment. The Court held that on an application alleging "on information and belief" facts which on their face show an authorized investigation (the instant application contains no such allegation and makes no such showing) the employer was not entitled to an adjudication on the question of coverage. The Court also held that if the Administrator was wrong the employer could correct him at a proceeding to enforce the orders of the Administrator. But, such a holding allows no remedy where there has been an unconstitutional search and seizure, because the employer will have already been subjected to a violation of his constitutional rights. The First Circuit Court of Appeals affirmed the District Court.

The Endicott-Johnson Corp. case is clearly distinguishable from the General Tobacco & Grocery Co. case, and from the instant case. The authority of the General Tobacco & Grocery Co. case, which lays down rules applicable to the present case, is not diminished in any respect by the decision in the Endicott-Johnson Corp. case.

The Circuit Court of Appeals for the Eighth Circuit Erred in Reversing and Remanding the Cause With Directions That "the Administrator Should Be Given Leave to Amend His Application, If He Can and Wishes to Do So, to Allege That He Has Reasonable Ground to Believe That" Petitioners' Business Is Subject to the Fair Labor Standards Act, Where There Was No Error in the Record on the Pleadings Presented to the District Court, and Where the Administrator Did Not at Any Time Seek or Ask Leave to Amend His Application.

The Administrator in his application to compel compliance, designedly and deliberately tendered a single issue to the District Court, and that issue was whether he had an absolute right to a compliance order from the District Court for the enforcement of the investigatory subpoena duces tecum under Sections 9 and 11 (a) of the Fair Labor Standards Act, without regard to whether the business of the Petitioners was actually subject to the Act. The Administrator's contention throughout the entire proceedings, including the appeal, was that he has the unlimited and unrestricted right and authority to investigate and issue a subpoena duces tecum to anyone, irrespective of whether such party is or is not within the coverage of the Fair Labor Standards Act, and that the District Court, when called upon by him to enforce such subpoena, has no right to inquire into his authority under the Act to issue such subpoena, or to enforce such subpoena.

The Administrator could have amended his application

at any time before the order of dismissal, as of right, United States v. Newbury Mfg. Co. (C. C. A. 1st), 123 F. (2d) 453, but he did not choose to do so. At the time of the dismissal, or at any time during the three months thereafter within which he had the right to take his appeal, he could have asked the District Court for leave to amend, but he did not elect to do so. After the appeal was taken, he could have dismissed the appeal and thus restored jurisdiction to the District Court so that he could ask leave to amend, Baltimore S. S. Co. v. Phillips (C. C. A. 2nd), 9 F. (2d) 902, or he could have requested the District Court to ask the Circuit Court of Appeals to remand the case so that motion for leave to amend his application could be filed, Roemer v. Simon, 91 U. S. 149. The Administrator did not do any of these things. The only issue the Administrator wanted tried, and the only issue presented in his pleadings, was whether he could demand of the District Court a compliance order without making any allegations or showing of any kind that petitioners were within and subject to the Act. The application of the Administrator as presented to the District Court was fatally defective, and the district so held. The Circuit Court of Appeals likewise found that the application was fatally defective, because it found that the Administrator in order to proceed further on the remand must amend ("if he can and wishes to do so") his application to allege some basis of authority for the issuance of the subpoena. If the Administrator cannot or does not wish to amend his application, the action of the District Court, even under the opinion of the Circuit Court of Appeals, is correct and final and the proceedings are terminated.

The law is well established that an appellate court must affirm a decision of a lower court where the lower court correctly decides the issues presented to it.

Thus it is said in Potts v. Village of Haverstraw (C. C. A. 2nd), 93 F. (2d) 509:

"We cannot reverse the judgment dismissing the action unless the judge who entered it committed some error."

And see Realty Acceptance Corp. v. Montgomery, 284 U. S. 547, 551, where the petitioner contended that Section 228 of Title 28, U. S. C., authorized the Circuit Courts of Appeal to modify or reverse any judgment, decree or order of a District Court, and to direct further proceedings to be had by the inferior court, including authority to set aside a judgment and remand the cause to receive newly discovered evidence. This Court rejected this contention and, in relation to a case relied upon by the petitioner, said:

"Nothing was there said to indicate that this court would order further proceedings below to attack or set aside a judgment entered on a record which disclosed no error calling for a modification or reversal."

As has been pointed out, there was only one issue presented to the District Court on the pleadings, and this issue was correctly decided, and the Court of Appeals found that the District Court had correctly ordered the one issue before it. Yet, the Circuit Court of Appeals reversed the District Court for correctly deciding the only issue presented to that Court. The process by which the Circuit Court of Appeals reversed the District Court involves some curious reasoning. The Court said:

"The order of the District Court, denying the enforcement application here, was based upon the lack of any allegation or offer to make proof of coverage on the part of the administrator. Since the matter was thus determined upon an improper issue or basis, the order will be reversed and the cause remanded for further proceedings in harmony with this opinion. The Administrator should be given leave to amend his application, if he can and wishes to do so, to allege that he has reasonable ground to believe that appellees' business is subject to the Act, as a basis of any

showing that he is able and may desire to make on further hearing in the District Court."

Thus, it is seen that the Circuit Court of Appeals, instead of answering the only question presented to it by the pleadings, digressed and raised a question of what in its opinion should have been held had a different issue been presented. It says that if the Administrator had alleged (which he did not, although he had ample opportunity to do so) that he had reasonable grounds to believe that petitioners' business was subject to the Act, then the District Court should not have ruled as it did. This issue was not before the District Court, nor was it before the Circuit Court of Appeals. Yet, because the District Court did not consider that which was not and could not have been before it under the law, the pleadings or the facts of the case, the Circuit Court ruled that "the matter was determined on an improper issue or basis." In other words, the Circuit Court of Appeals enunciated a doctrine that our courts are not to consider the issues presented to them by the pleadings of the parties, but instead are to conjure up all the possible allegations that the parties might have made (without regard to whether they actually could have made them) and then decide the case on what might have been before the court rather than what was before the court.

The defect in the Administrator's application was no mere defect in form, it was a fundamental defect in substance upon which the District Court ruled correctly. The District Court's ruling should have been affirmed.

CONCLUSION.

First. This case is particularly appropriate for review because it involves a ruling on a proceeding to enforce a subpoena duces tecum under the Fair Labor Standards Act of 1938, and the holding of the Circuit Court of Appeals for the Eighth Circuit is contrary to the provisions of said Act.

Second. The holding of the Circuit Court of Appeals for the Eighth Circuit will allow the Administrator of the Wage and Hour Division to unreasonably search and seize the documents of the petitioners, contrary to the Fourth Amendment of the Constitution of the United States.

Third. The decision of the Circuit Court of Appeals for the Eighth Circuit is in conflict with the decision of the Sixth Circuit Court of Appeals in General Tobacco & Grocery Co. v. Fleming, 125 F. (2d) 596.

Fourth. The decision of the Circuit Court of Appeals for the Eighth Circuit misapplies and misconstrues the holding of this Court in Endicott Johnson Corp. v. Perkins, 317 U. S. 501.

Fifth. The question of law involved is in confusion and should be clarified, and is of wide importance in the administration of the Fair Labor Standards Act.

Sixth. The decision of the Court of Appeals for the Eighth Circuit is so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Wherefore, it is earnestly contended that certiorari should be granted by this Court, requiring the Court of Appeals for the Eighth Circuit to certify the record in this case to this Court for review and determination.

Respectfully submitted,

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No. 446

In the Supreme Court of the United States

October Term, 1943

C. K. Benson and W. Havard Perkins, Doing Business as Perkins and Company, a Partnership, Petitioners

v.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

Memorandum for the Respondent in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 446

C. K. BENSON AND W. HAVARD PERKINS, DOING BUSINESS AS PERKINS AND COMPANY, A PARTNERSHIP, PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

No written opinion was issued by the district court. The final order of that court sustaining the motion of the petitioners and dismissing respondent's application appears in the record, pages 9–10. The opinion of the circuit court of appeals is reported in 137 F. (2d) 501 (R. 14–23).

JURISDICTION

The judgment of the circuit court of appeals was entered on August 13, 1943 (R. 23–24). The petition for a writ of certiorari was filed on October 21, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Administrator is entitled to an order of the district court enforcing compliance with his subpena *duces tecum* without a determination that petitioners are subject to the Fair Labor Standards Act.

STATUTE INVOLVED

The statutory provisions involved are Sections 7, 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. sec. 201, and Section 9 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 15 U. S. C., sec. 49. The pertinent portions of these provisions are set forth in the Appendix.

STATEMENT

On June 17, 1942, the Administrator, pursuant to Section 9 of the Fair Labor Standards Act, applied to the district court for an order requiring petitioners to produce, before his authorized representatives, certain records described in an administrative subpena *duces tecum* (R. 5–7) pre-

viously served upon petitioners (R. 1–5). The documents requested by the subpena were petitioners' records showing wages paid to and hours worked by their employees, the goods produced or to be produced, and the shipment, transportation, delivery or sale of goods by them from October 24, 1938 (the effective date of the Act), to June 9, 1942.

The application for enforcement alleged that the petitioners were doing business as a "partnership engaged in the practice of public accounting" at St. Louis, Missouri, and that the Administrator had "reasonable grounds to believe" that the petitioners "had been and were violating the provisions of Sections 7 (a) (1), (2) and (3) of said Act" (R. 2).[1] It also alleged that the subpena had been duly served upon petitioners who had custody and control of the records sought to be inspected, but that at the return date of the subpena, and since that date, the petitioners have failed and refused to produce such records.

Petitioners filed a motion to dismiss the Administrator's application for enforcement of the

[1] In their petition for certiorari petitioners emphasize that the Administrator did not set forth in his application any allegation that he had reasonable ground to believe that petitioners or any of their employees were engaged in commerce or the production of goods for commerce (Pet. p. 3. See also petitioners' brief in support of petition, pp. 18, 26). But such allegation is clearly implicit in the allegation (quoted in the text) of reasonable grounds to believe petitioners had been and were violating the Act.

subpena "for lack of jurisdiction apparent on the face of said application" (R. 8–9).

The district court, on October 29, 1942, sustained petitioners' motion and dismissed the Administrator's application, without opinion (R. 9–10). The circuit court of appeals reversed and remanded with directions. In its opinion the court of appeals stated that where reasonable ground appears for conducting an investigation, the Administrator is entitled to judicial enforcement of his subpena *duces tecum* without being required to prove that the employer's business is actually subject to the Act. The court said further that the Administrator is not entitled to enforcement of an investigatory subpena as to any industry which he has no reasonable ground to believe is subject to the Act; that he is required to show "probable cause" or a "justifiable basis" for believing that the subject's business, "in some phase, was apparently and probably subject to the Act" (R. 21). The order of the district court was reversed and the cause remanded for further proceedings, with directions to the district court to grant leave to the Administrator "to amend his application, if he can and wishes to do so, to allege that he has reasonable ground to believe that appellees' [petitioners'] business is subject to the Act, as a basis for any showing that he is able and may desire to make on the further hearing in the district court" (R. 23).

The petitioners thereupon applied for a rehearing, which was denied on September 9, 1943 (R. 55).

ARGUMENT

The issue in this case is the same as the issues presented in *Standard Dredging Corporation* v. *Walling,* No. 964, October Term, 1942, in which this Court denied certiorari on June 1, 1943, and in *Mississippi Road Supply Company* v. *Walling,* No. 206, October Term, 1943, in which certiorari was denied on October 11, 1943. In the Government's brief in opposition to the petition for certiorari in each of those cases we took the position that this Court's decision in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, was controlling, and that any conflict between the decision of the courts below and that of the Sixth Circuit in *General Tobacco and Grocery Co.* v. *Fleming,* 125 F. (2d) 596, was resolved by the *Endicott Johnson* decision. It was also pointed out that every circuit court of appeals which had considered the question, except the Sixth Circuit, had taken the view that trial and determination of the issue whether an employer is subject to the Fair Labor Standards Act is not a prerequisite to the enforcement of a subpena. *Fleming* v. *Montgomery Ward & Co.,* 114 F. (2) 384 (C. C. A. 7), certiorari denied 311 U. S. 690; *Cudahy Packing Co.* v. *Fleming,* 122 F. (2) 1005 (C. C. A. 8), reversed, 315 U. S. 785, on the ground that

the subpena in that case was not issued by the Administrator; *Cudahy Packing Co. of Louisiana* v. *Fleming,* 119 F. (2d) 209 (C. C. A. 5), reversed on the same ground, 315 U. S. 357; *Martin Typewriter Co.* v. *Walling,* 135 F. (2d) 918 (C. C. A. 1).

There is even less occasion for granting the petition for certiorari in this case than there was in the *Standard Dredging* or the *Mississippi Road Supply* cases. In the *Standard Dredging* case the district court ruled that the Administrator was not obliged "to make any showing that the respondent is engaged in commerce." 44 F. Supp. 601 at 602. In the *Mississippi Road Supply* case, where the district court had required a showing of "probable cause" by affidavits, the Fifth Circuit indicated that "the presumption of regularity of the proceedings of public officers" (136 F. (2d) 391 at 394) justifies enforcement of the Administrator's subpena, "unless on the face of the proceedings they are unlawful or oppressive." 136 F. (2d) 391 at 394. In the instant case, the requirement of the decision below that the Administrator "satisfy the district court" of "reasonable ground" would seem to place a heavier burden on the Administrator than may be warranted. Certainly, it sufficiently safeguards petitioners' interests. Review having been denied in the *Standard Dredging* and *Mississippi Road Supply* cases, *a fortiori,* it should be denied here.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1943.